# *2011 DRAFTING REQUEST*

## Bill

Received: **07/27/2011**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Jeremy Thiesfeldt (608) 266-3156**

By/Representing: **Hariah**

May Contact:

Drafter: **phurley**

Subject: **Criminal Law - sentencing**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Thiesfeldt@legis.wi.gov**

Carbon copy (CC:) to:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Refusing probation

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**Instructions:**

See attached

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**Drafting History:**

| Vers. | Drafted | Reviewed | Typed | Proofed | Submitted | Jacketed | Required |
|---|---|---|---|---|---|---|---|
| /? | | | | _____ | | | S&L |
| /1 | phurley<br>07/28/2011<br>phurley<br>08/25/2011 | wjackson<br>08/15/2011<br>wjackson<br>08/26/2011 | rschluet<br>08/16/2011 | _____<br>_____<br>_____<br>_____ | sbasford<br>08/16/2011 | | S&L |
| /2 | | | phenry<br>08/29/2011 | _____<br>_____ | sbasford<br>08/29/2011 | lparisi<br>08/29/2011 | |

FE Sent For:

at intro
9-29-11

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FE Sent For: /2 WLJ 8/26

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See attached

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|---|---|---|---|---|---|---|---|
| /? | phurley | 1 WLJ 8/15 | 8/15/11 | | | | S&L |

FE Sent For:

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Fond du Lac Area since 1870

# Drug users opting for jail

## More prefer to avoid probation, treatment options

**By Russell Plummer**
The Reporter
rcplummer@fdireporter.com

Some drug addicts are opting for jail time instead of battling their demons, says a local judge.

Fond du Lac County Circuit Court Judge Peter Grimm recently issued a press release expressing concern about the number of drug cases appearing in court and the need for friends and family to help address the problem.

If a user appears in court for drug possession, judges have numerous options to try to help. In the case of a juvenile, probation can be forced upon them, allowing for an agent to oversee their progress in bucking the habit.

Peter Grimm

"In adult court, the defendants can actually decline probation, which we are seeing more of," Grimm said. "That's concerning for me. By law, I cannot impose it (probation). I have to decide what is the amount of incarceration."

The defendants are picking time behind bars instead of

### Rejecting probation

"It's a concern because we are getting young offenders who come in and say, 'I don't want probation.' That tells me they don't want to change their drug lifestyle," he said.

Grimm said a defendant will claim to be sober and state that he or she doesn't need help to stay clean.

He added that Fond du Lac County has been proactive in putting money behind juvenile treatment.

"We have a lot of juveniles who get inpatient residential care for their addictions," Grimm said. "I am proud of this county and its willingness to spend funds for juveniles. Unfortunately, we sometimes see those kids again in their 20s."

Sheriff's Department Chief Deputy Mark Strand said the drug problem is evident inside the Fond du Lac County Jail.

"Some people will decide they don't want to be on probation anymore and will revoke themselves," Strand said. "They wind up doing quite a bit of jail time, but at least when they are done, they are no longer on probation. The phrase is, 'I don't want be on paper anymore.'"

Inmates will serve a full sentence and then be released with no monitoring, Strand said.

"That's not a harmonious outcome for anybody," Strand said. "It's not good for society or the inmate."

See DRUGS Page A8

# Drugs

Continued from Page A1

## Finding a solution

Grimm said the Lake Winnebago Area Metropolitan Enforcement Group (MEG Unit) is working hard to crack down on drug dealers.

"We want to deal with the root of the problem. Many of the dealers do not use the drug that they are selling," Grimm said. "We treat those cases differently than the addict who is selling drugs to support their habit."

According to the MEG Unit's 2010 threat assessment, marijuana remains the Fox Valley area's most widely available drug. Cocaine is a concern since it is associated with crime and violence.

The cocaine business in Fond du Lac County took a major hit when law enforcement authorities arrested Alejandro Patino-Gomez, the head of a cocaine ring. He was sentenced last year to 18 years in prison.

However, the MEG Unit reports illegally obtained pharmaceuticals are the greatest threat to the Fox Cities.

## DRUG CASES

The number of drug cases in Fond du Lac County Circuit Court by year:

2010 — 170
2009 — 147
2008 — 218
2007 — 206
2006 — 199
2005 — 186
2004 — 213
2003 — 240
2002 — 221
2001 — 210

2010 cases, by percent:

- Marijuana (53)
- Cocaine (27)
- Opiate (14)
- Anxiety pills (4)
- Mushrooms (2)
- Methamphetamine (.4)

*SOURCE: Circuit Court Judge Peter Grimm*

Grimm said the view from his bench is that Fond du Lac County has a drug problem.

"I want to sound the alarm bell and let the concern be shared that family and friends need to be more proactive with drug users and drug addicts," Grimm said. "We need to focus on the users and get them help through interventions."

## Downward spiral

Grimm noted that youth often develop an addiction and have no clue what kind of path they are on.

"Some of the kids that spiral downwards — I'm talking about 18 to 25 — go on crime sprees," Grimm said. "We are seeing a lot of brazen robberies, burglaries and thefts. They are desperate and out of control."

Grimm urges friends and family to intervene with drug abusers, adding that the Fond du Lac County Health Care Center has a quality Alcohol and Other Drug Abuse (AODA) program.

However, Strand said addicts are often left alone when fighting a habit.

"In an ideal world, people's loved ones should get involved and try to help," Strand said. "A lot of times, these individuals don't have stakeholders as in a family. A lot of times, the user has the attitude of 'I'll live for today and worry about tomorrow later.' That's not the way to go about life."

16W

## Hurley, Peggy

**From:** Hutkowski, Hariah
**Sent:** Tuesday, July 19, 2011 10:38 AM
**To:** Hurley, Peggy
**Subject:** article I was talking about

973.09 = Probation

**Attachments:** 20110719104405199.pdf

20110719104405199.pdf (191 KB)...

Just stay on stand by as we figure out a time to all talk with Peter Grimm.

Hariah Hutkowski
Legislative Assistant
Rep. Thiesfeldt's office
1-888-529-0052
FAX: 608-282-3652

-----Original Message-----
From: networkscanning@legis.wisconsin.gov [mailto:networkscanning@legis.wisconsin.gov]
Sent: Tuesday, July 19, 2011 10:44 AM
To: Hutkowski, Hariah
Subject: Message from "19WEST"

This E-mail was sent from "19WEST" (Aficio MP 6001).

Scan Date: 07.19.2011 10:44:05 (-0500)
Queries to: networkscanning@legis.wisconsin.gov

## VII. *REFUSAL OF PROBATION*

Finally, one of the defendants, Ms. Carol Robbins, challenges Judge McMahon's refusal to honor her request for a sentence of incarceration and not probation. Ms. Robbins was placed on eighteen months probation, conditioned upon her not violating any criminal law and not having any contact within 500 feet of the facility. Ms. Robbins told Judge McMahon she would rather be sentenced instead of being placed on probation. Judge McMahon refused and Ms. Robbins now appeals.

**Page 541**

Ms. Robbins relies on *Garski v. State*, 75 Wis.2d 62, 77, 248 N.W.2d 425 (1977), and *State v. Smith*, 100 Wis.2d 317, 302 N.W.2d 54 (Ct.App. 1981), *overruled on other grounds, State v. Firkus*, 119 Wis.2d 154, 350 N.W.2d 82 (1984), for the proposition that she has the right to reject probation if she believes it is more onerous than a possible sentence.

In *Garski*, this court stated: "If the defendant finds the conditions of probation more onerous than the sentence which would have been imposed he can refuse the probation." *Garski*, 75 Wis.2d at 77. This statement was based upon this court's interpretation of the probation statute, sec. 973.09, Stats. (1977), at the time of *Garski*. The current version of sec. 973.09 is substantially similar to the 1977 statute in respect to when probation may be imposed and we feel bound by our prior interpretation of this statute in the absence of very compelling reasons to overrule our prior interpretation.

Presumably the legislature was aware of this court's holding in *Garski* that a defendant may refuse probation. Since *Garski*, the legislature has amended sec. 973.09, Stats., in 1979, 1981, 1983, 1985 and 1987. In none of these amendments has it changed the effect of this court's ruling that a defendant need not accept probation in lieu of sentencing.

Section 973.09(7m)(a), Stats., permits a defendant to refuse the imposition of community service as a condition of probation. Nowhere else, however, has the legislature stated that probation or any other condition of probation which may be imposed may be refused by a defendant. Thus it is clear that the legislature has not seen fit to change the statute to overcome the effects of the *Garski* decision.

We recognize that our interpretation can prevent a circuit court from imposing probation which, in a given

**Page 542**

case, may be more desirable both for society and an individual defendant than the imposition of a sentence; in this case up to ninety days in jail or a fine not to exceed $1,000 or both as provided by the statute. The legislature might consider that rejection of probation in some circumstances may result in jail overcrowding; however in view of our prior holding, the matter of a defendant's option to reject probation is a question better left to the legislature. **We respectfully suggest that the legislature give consideration to amending the probation statute to eliminate optional rejection of probation by a convictee.** Consequently, we conclude that Judge McMahon erred by failing to honor Ms. Robbins' refusal of probation and we remand the matter for resentencing.
State v. Migliorino, 150 Wis. 2d 513 (1989)

STATE v. McCREADY, 2000 WI App 68
234 Wis.2d 110, 608 N.W.2d 762
STATE OF WISCONSIN, PLAINTIFF-RESPONDENT, v. JAMES McCREADY,
DEFENDANT-APPELLANT.[fn†]
Court of Appeals of Wisconsin.
Nos. 99-1822-CR, 99-1823-CR
Submitted on briefs January 26, 2000.
Opinion Released: February 23, 2000
Opinion Filed: February 23, 2000
[fn†] Petition to review denied.
**Page 111**

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

On behalf of the defendant-appellant, the cause was submitted on the brief of James E. Doyle, attorney general, and Sally L. Wellman, assistant attorney general.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of James E. Doyle, attorney general, and Sally L. Wellman, assistant attorney general.

Before Brown, P.J., Anderson and Snyder, JJ.

¶ 1. BROWN, P.J.

James McCready comes before this court arguing that the circuit court did not have subject matter jurisdiction to grant him the very relief he sought-termination of his probation. His posture before the court begs for application of judicial

estoppel. We reach the merits, however, and conclude that a probationer has the right to refuse probation not only when it is first imposed but at any time while serving it. A grant of a probationer's request to end probation is not a judicial revocation and thus not prohibited by ***State v. Horn***, 226 Wis.2d 637, 594 N.W.2d 772 (1999). We affirm the judgment and order of the circuit court.

**Page 112**

¶ 2. The facts here are not in dispute. McCready pled guilty to forgery uttering and misdemeanor counts of obstructing, possession of THC, bail jumping and possession of drug paraphernalia. On the uttering charges, the circuit court withheld sentence and placed McCready on probation for five years. One of the conditions of probation was that McCready spend one year in the county jail with six months of the term stayed. Additionally, for the misdemeanor charges, McCready was to serve ninety days consecutive to the six months' conditional time. McCready was informed of his right to appeal but chose not to. Due to McCready's refusal to provide detectives with information about his fellow gang members, the six months that had been stayed was imposed as a condition of probation. After serving close to one year on probation, McCready, acting pro se, moved the court to terminate probation. At the hearing, McCready appeared with counsel. Counsel informed the circuit court that he had tried to discourage McCready from refusing probation and had warned McCready of the risk of prison time. The court lifted McCready's probation and sentenced him to five years in prison.

¶ 3. McCready now argues that the circuit court did not have authority to terminate his probation. In ***Horn***, our supreme court held that vesting revocation power in the executive branch, rather than the judicial branch, does not offend our state constitution's separation of powers. McCready seizes upon the following language in ***Horn*** to support his argument: "once a defendant has been charged with a crime, tried, defended, convicted, sentenced, and gone through an appeal if desired, the litigation is over and the judicial process has ended." ***Id.*** at 650. McCready's time to file a direct appeal had expired when he appeared before the

**Page 113**

circuit court. Under ***Horn***, he argues, the circuit court's involvement was over and only the Department of Corrections (DOC) had the authority to revoke his probation. In response to the State's reliance on ***State v. Migliorino***, 150 Wis.2d 513, 442 N.W.2d 36 (1989), McCready acknowledges that a defendant does have the right to refuse probation, but claims that the defendant must refuse at the time of sentencing. He points out that the time for him to file a sentence modification request under Wis. Stat. § 973.19 (1997-98)[fn1] had already expired when he asked the court to end his probation. The State answers that there is no good reason or legal authority to confine the right to refuse probation to the time when it is imposed. Finally, the State points out that the time limits in § 973.19 are

regulatory, not jurisdictional. *See* ***Cresci v. State***, 89 Wis.2d 495, 503, 278 N.W.2d 850 (1979).

¶ 4. ***Migliorino*** controls this case, not ***Horn***. The question in ***Horn*** was whether the DOC's ability to assess a probationer's compliance with conditions and determine if revocation is necessary impermissibly infringed on the court's power to impose conditions. *See* ***Horn***, 226 Wis.2d at 641-42. **The supreme court first pointed out that probation and probation revocation are within powers shared by the judicial and legislative branches.** *See* ***id.*** at 648. Thus, the issue boiled down to whether the legislative delegation of probation revocation to the executive branch unduly burdened or substantially interfered with the powers of the judiciary. *See* ***id.*** The court concluded that it did not, as the judiciary retained the power to impose sentence. *See* ***id.*** at 653.

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¶ 5. Here, McCready himself sought termination of his probation. The circuit court did not make any determination of McCready's compliance with probation conditions nor did the circuit court decide to pull McCready off probation. This is not a situation like ***Horn***, where the DOC was seeking to revoke probation. On the contrary, McCready came to court, hat in hand, against the advice of counsel and his probation agent, asking the court to terminate his probation. In his motion, McCready stated: "I wish to be released or revocated [sic] and sent to prison to finish my incarceration." In a subsequent motion he explained to the court: "I understand probation is a privilege. The privilege creates endless conflict and drastically postpones my goals. I refuse to be on probation." ***Horn*** in no way prevented the court from granting McCready his requested relief.

¶ 6. Rather than prohibit the circuit court's termination of probation, case law establishes that it would have been error for the circuit court to refuse McCready's request. *See* ***Migliorino***, 150 Wis.2d at 541. In ***Migliorino***, the supreme court relied on the following statement from ***Garski v. State***, 75 Wis.2d 62, 248 N.W.2d 425 (1977): "If the defendant finds the conditions of probation more onerous than the sentence which would have been imposed he can refuse the probation." ***Migliorino***, 150 Wis.2d at 541 (quoting ***Garski***, 75 Wis.2d at 77). The court went on to "respectfully suggest that the legislature give consideration to amending the probation statute to eliminate optional rejection of probation" by the defendant, reasoning that in some cases probation "may be more desirable both for society and an individual defendant than the imposition of a sentence." ***Id.*** at 542. Since ***Migliorino*** was

**Page 115**

decided, the legislature has amended the probation statute, *see, e.g.*, 1997 Wis. Act 289, §§ 5-7, but has not opted to statutorily eliminate a defendant's right to reject probation. And while McCready argues that the right may only be exercised when probation is first imposed, there is nothing in the cases or the statutes to

support that conclusion. On the contrary, the quoted language from ***Garski*** suggests that the defendant would exercise the right after serving some time on probation-at that point he or she is in a position to determine just how onerous the conditions are. We conclude that the right to reject probation lasts throughout the probationary period.

¶ 7. McCready also argues that his request for termination of probation was a Wis. Stat. § 973.19 motion for sentence modification and as such was untimely. *See* § 973.19(1)(a) (setting time limit for motion at ninety days after imposition of sentence). The State correctly points out that the time limits set forth in that statute are regulatory, not jurisdictional. *See* ***Cresci***, 89 Wis.2d at 503. We say that § 973.19 is irrelevant. McCready, at the time of his motion, was not a "person sentenced to imprisonment or the intensive sanctions program or ordered to pay a fine," *see* § 973.19(1)(a), so the statute does not apply to him. His motion was not one to modify his sentence but rather one to reject probation. Our supreme court has expressly granted a probationer the right to refuse probation. *See* ***Migliorino***, 150 Wis.2d at 541; ***Garski***, 75 Wis.2d at 77. The time limits in § 973.19 have nothing to do with this case.

¶ 8. While we have addressed the merits of McCready's argument rather than decline to do so under the doctrine of judicial estoppel, we pause to

**Page 116**

comment on the propriety of his argument. Judicial estoppel is intended "to protect against a litigant playing `fast and loose with the courts' by asserting inconsistent positions." ***State v. Fleming***, 181 Wis.2d 546, 557, 510 N.W.2d 837 (Ct.App. 1993) (quoting ***Yanez v. United States***, 989 F.2d 323, 326 (9th Cir. 1993) (quoting ***Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council***, 851 F.2d 1208, 1210) (9th Cir. 1988))). That is exactly what McCready is doing here. He came before the circuit court and asked for relief. The circuit court granted it. Now he complains that the circuit court had no authority to do precisely what he asked it to do. While there is a right to reject probation, this case stands as an example of why persons on probation should be careful what they ask for.

*By the Court.* — Judgment and order affirmed.

II.

¶ 21. We next address whether the trial court erred in determining at the "status review" hearing that Pote rejected the probation the court originally ordered.

¶ 22. In Wisconsin, the power to revoke a judicially imposed term of probation is statutorily vested with the executive branch. Wis. Stat. § 973.10(2); *see* ***State v. Horn***, 226 Wis.2d 637, 653,

**Page 443**
594 N.W.2d 772 (1999). The sentencing court may, however, modify the conditions of or extend a term of probation. Wis. Stat. § 973.09(3)(a). The supreme court has determined that when a defendant refuses to accept probation and requests instead that a sentence be imposed, a court must honor the request. ***State v. Migliorino***, 150 Wis.2d 513, 540-42, 442 N.W.2d 36 (1989). This court concluded in ***State v. McCready***, 2000 WI App 68, 234 Wis.2d 110, 608 N.W.2d 762, that ***Migliorino*** and not ***Horn*** governs when a defendant who has already served a portion of his or her probation requests the court to terminate the probation and impose a sentence. ***Id.*** at ¶¶ 4-6.

¶ 23. In order to address Pote's claim that the trial court erred in determining that he had rejected the probation originally ordered, we must answer two distinct questions. The first is whether the trial court's determination that Pote rejected probation is a factual question not to be disturbed on appeal unless clearly erroneous, or one of law subject to our de novo review. Not surprisingly, the State contends it is the former while Pote argues it is the latter.[fn3] We agree with the State.

¶ 24. In support of his assertion that our review should be de novo, Pote cites ***State v. Hansen***, 168 Wis.2d 749, 755, 485 N.W.2d 74 (Ct.App. 1992). Our opinion in ***Hansen***, however, had nothing to do with a defendant's rejection of probation. On the page Pote cites, we stated only the well-established principle that our review of whether a defendant has made a prima facie showing that a plea was accepted without the

**Page 444**
procedures required under ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), is "a question of law which we review without deference to the trial court's determination." ***Hansen***, 168 Wis.2d at 755. As we explain below, we conclude that ***Bangert*** — like procedures are not required when a defendant opts to forego probation in favor of an imposed sentence. We thus conclude that ***Hansen*** is of no assistance on the question of whether the determination that a defendant has rejected probation is one of fact or of law.

¶ 25. At bottom, the question is one of determining Pote's intent when he appeared before the trial court for a review of the status of his probation. Determining what a person intends by evaluating his or her words and actions under the facts and circumstances at hand is generally viewed as a factual determination. *See* ***State v. Lettice***, 221 Wis.2d 69, 77, 585 N.W.2d 171 (Ct.App. 1998) ("Whether a prosecutor intended to provoke a mistrial . . . is a question of fact . . . ."). Thus, we may set aside the trial court's determination that Pote, by his words and actions in its presence, communicated a refusal to accept the probation originally ordered only if we conclude that the determination was clearly erroneous. We conclude it was not.

¶ 26. Pote points out that his counsel replied in the negative when the court inquired "is he rejecting probation?" We conclude the relevant inquiry, however, is not what Pote's counsel told the court, but what Pote himself communicated to the court regarding his intent.[fn4] When the court specifically informed Pote that it

**Page 445**

would deem it a rejection of probation if he refused to then and there sign the rules of probation, Pote, after conferring with counsel, responded, "[t]hen I guess I sit in jail." Although Pote argues that this response was ambiguous and could have been a reference to the service of his civil contempt sanction, it was the trial court's role and not ours to interpret Pote's response. It did so ("Then he has rejected probation."), and we cannot conclude that the court's finding was clearly erroneous.

¶ 27. Pote plainly communicated to his probation officer and the court that he did not intend to comply with the condition of his probation that he pay past and current child support absent proof that he had fathered the child, notwithstanding the paternity judgment so finding and the fact that he had apparently been current in support payments as of May 1, 1999. His counsel, whom the court found credible, testified at the postconviction hearing that "Mr. Pote's position was that he was never going to pay child support, and he didn't care what the consequences were." In short, the record taken as a whole, satisfies us that the trial court's determination that Pote's response indicated his intent to reject probation was not clearly erroneous. Our conclusion is fortified by the deference we must accord the trial court's opportunity to observe and evaluate Pote's demeanor, tone and body language at the probation review hearing.

¶ 28. Pote contends, however, that we should require a defendant's rejection of probation to be clear and unequivocal. That is, Pote would have us reverse

**Page 446**

because Pote never said "I reject probation" or "I refuse to be on probation." We decline to impose such a requirement. We conclude that a court's focus should be on whether a defendant communicates the intent to refuse probation rather than on

the defendant's choice of words. As we have discussed, the question is one of fact for the trial court to determine in the first instance, and for us to review on the clearly erroneous standard.

¶ 29. Even though we conclude the court did not err in its factual determination of Pote's intent, our inquiry into the propriety of the court's determination that Pote rejected probation is not at an end. The second question we must address is what procedural safeguards, if any, should the trial court have employed to ensure that Pote's decision to reject probation was knowing and voluntary? That is, even if the trial court did not err in finding that Pote rejected probation, did it nonetheless err by failing to conduct a colloquy to determine Pote's understanding of the potential consequences of rejecting probation? Pote urges us to adopt a requirement for a probation-rejection colloquy similar to those for the acceptance of a plea,[fn5] waiver of jury trial[fn6] or waiver of counsel.[fn7] The State responds that there is "no logical or legal reason why the doctrines and body of law governing a defendant's waiver of constitutional rights should be layered onto the question of whether a defendant intended to reject probation." Again, we agree with the State.

**Page 447**

¶ 30. We do not dispute Pote's assertion that probationers possess a "conditional liberty interest" in the continuation of probation, and that probation cannot be involuntarily terminated without a revocation hearing affording certain procedural protections. *See* ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973). But this is not a case where the State sought to revoke Pote's probation, and thus the issue before us is not whether Pote knowingly and voluntarily waived his constitutional right to a due process hearing on the State's grounds for revocation. Rather, the question is whether Pote rejected probation in favor of having a sentence imposed for the offense of which he was convicted. We have previously concluded that a "tardy" rejection of probation is nonetheless a rejection, and does not become a revocation or modification simply because the probation term has commenced. *See* ***McCready***, 2000 WI App 68 at ¶ 6 ("[T]he right to reject probation lasts throughout the probationary period."). Quite simply, the conditional liberty Pote might have enjoyed on probation was not taken from him by either the State or the court-he opted not to accept the probation offered to him.

¶ 31. While we might not go so far as the State in labeling probation "a matter of grace or privilege," we do agree with it that defendants have no constitutional or statutory *right* to be placed on probation in lieu of receiving a sentence for an offense. Unlike a defendant who is denied counsel or trial by jury, a defendant cannot claim constitutional error stemming solely from a court's failure to place him or her on probation. We thus reject Pote's suggestion that requirements similar to those in place for waiving a jury trial or

**Page 448**

representation by counsel are constitutionally required when a defendant declines the opportunity for probation.

¶ 32. We also decline to impose a rigid set of procedures as a matter of common law entitlement.[fn8] It is sufficient that the record show that the defendant knew the possible consequences of refusing probation, a showing typically supplied (as in this case) by the plea colloquy. Pote was informed before entering his plea that he faced a maximum five-year sentence if convicted of the offense. The court further informed him at the plea hearing that it was not bound by the parties' agreed upon recommendation for probation, and that if the recommended probation were revoked, he could be required to "serve a time in jail or prison." We conclude no additional colloquy was required at the time Pote rejected probation.

III.

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-2469/1

# 2011 BILL

AN ACT ...; **relating to:** eliminating the right to refuse probation.

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***Analysis by the Legislative Reference Bureau***

Under current law, when a person is convicted of committing a crime, except for certain serious crimes, the sentencing judge may withhold the person's sentence or impose a sentence but stay its execution and place the person on probation for a stated period. When a court places a person on probation, he or she may require the person to comply with conditions of probation that are reasonable and appropriate to the person's needs for punishment or rehabilitation. Under current law, if the court orders as a condition of probation that a person perform community service at a public agency or charitable organization, the person and the agency or organization must agree to the terms of performing community service. In State v. Migliorino, 150 Wis.2d 513, 442 N.W. 2d (1989), the Wisconsin Supreme Court held that a person has the right to refuse to be put on probation and opt instead for imprisonment.

Under this bill, a person may not refuse to be put on probation and may not refuse any condition of probation, except that the bill does not change the requirement that the person and the public agency or charitable organization agree to the terms of the person's performance of community service at the agency or organization.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

**SECTION 1.** 973.09 (1d) of the statutes is created to read:

973.09 **(1d)** No person may refuse to be placed on probation or, except as provided in sub. (7m), may reject a condition of probation.

**(END)**

# State of Wisconsin
**2011 – 2012 LEGISLATURE**

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Under this bill, a person may not refuse to be put on probation and may not refuse any condition of probation, except that the bill does not change the requirement that the person and the public agency or charitable organization agree to the terms of the person's performance of community service at the agency or organization.

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**(END)**

## Hurley, Peggy

**From:** Hutkowski, Hariah
**Sent:** Thursday, August 25, 2011 2:19 PM
**To:** Hurley, Peggy
**Subject:** change of language to LRB 2469/1 Topic: Refusing probation analysis

**Attachments:** Analysis by the Legislative Reference BureauB.docx

Peggy,

A judge who is helping us review this possible bill had some additional language to clarify the analysis section. If you agree that the language is accurate could you please add it in and send over a /2 ? Thanks,

Analysis by the Legislative Re...

Hariah Hutkowski

*Legislative Assistant*
**Rep. Thiesfeldt's office**
1-888-529-0052
FAX: 608-282-3652

## *Analysis by the Legislative Reference Bureau*

Under current law, when a person is convicted of committing a crime, except for certain serious crimes, the sentencing judge may withhold the person's sentence or impose a sentence but stay its execution and place the person on probation for a stated period. When a court places a person on probation, ~~he or she~~ the judge may require the person to comply with conditions of probation that are reasonable and appropriate to the person's needs for punishment or rehabilitation such as AODA treatment, and payment of restitution. Under current law, if the court orders as a condition of probation that a person perform community service at a public agency or charitable organization, the person and the agency or organization must agree to the terms of performing community service. In *State v. Migliorino*, 150 Wis. 2d 513, 442 N.W. 2d (1989), the Wisconsin Supreme Court held that a person has the right to refuse to be put on probation and opt instead for imprisonment, but the Court did suggest the Legislature to consider an amendment to eliminate the option to reject probation. If probation is refused at sentencing, the court can only order a sentence to the county jail, a fine, or prison for felony cases, and issue a civil judgment for restitution, or order restitution as part of a prison sentence.

Under this bill, a person may not refuse to be put on probation and may not refuse any condition of probation, except that the bill does not change the requirement that the person and the public agency or charitable organization agree to the terms of the person's performance of community service at the agency or organization.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

t/c to Mariah: first 2 : ok; 2d 2 are not really analysis of bill as much as reasons for the bill. Mariah agrees to go w/ the first 2 only

# State of Wisconsin
## 2011 - 2012 LEGISLATURE

LRB-2469/1
PJH:wlj:rs

# 2011 BILL

AN ACT *to create* 973.09 (1d) of the statutes; **relating to:** eliminating the right to refuse probation.

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973.09 **(1d)** No person may refuse to be placed on probation or, except as provided in sub. (7m), reject a condition of probation.

**(END)**

## Barman, Mike

**From:** Hutkowski, Hariah
**Sent:** Monday, August 29, 2011 8:26 AM
**To:** LRB.Legal
**Subject:** Draft Review: LRB 11-2469/2 Topic: Refusing probation

Please Jacket LRB 11-2469/2 for the ASSEMBLY.